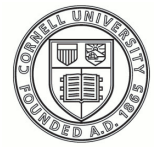



3-26-2002

# State of New York Public Employment Relations Board Decisions from March 26, 2002

New York State Public Employment Relations Board

# State of New York Public Employment Relations Board Decisions from March 26, 2002


## Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**DENNIS R. GILBERT,**

Petitioner,

- and - **CASE NO. C-5166**

**BUFFALO MUNICIPAL HOUSING AUTHORITY,**

Employer,

- and -

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

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**THOMAS P. MULLEN, for Petitioner**

**GILLIAN BROWN, ESQ., for Employer**

**NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of counsel), for Intervenor**

## BOARD DECISION AND ORDER

This interlocutory appeal comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to the ruling of the Administrative Law Judge (ALJ) denying its motion to dismiss a representation petition filed by an individual, Dennis R. Gilbert, permitting the amendment of the petition to name a purported employee organization as petitioner and scheduling a certification election without conducting an investigation regarding whether the employee organization existed at the time of the filing of the petition. The employer,

Buffalo Municipal Housing Authority (Authority), has not interposed a response, nor has Gilbert.

FACTS

On November 29, 2001, Gilbert filed a representation petition seeking to decertify CSEA as the representative of certain public safety employees in the employ of the Authority. Also, the petition sought certification but listed Gilbert as the petitioner. The petition was verified by Gilbert, individually, and the petition omits Gilbert's affiliation and/or representative capacity with an employee organization. The showing of interest attached to the petition is in the name of the Buffalo Peace Officers Association (Association). The declaration of authenticity indicates that the petition is on behalf of the Association, but it is signed by Gilbert without identifying his relationship with the Association.[1]

On January 4, 2002, after CSEA had interposed its answer to the representation petition seeking its dismissal because individual employees may not file certification petitions, Thomas P. Mullen, Labor Relations Associate for the Association, filed an

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[1]The declaration of authenticity, dated November 19, 2001, provides as follows:

> Let this letter serve as a Declaration of Authenticity that those who have signed the attached petitions did so willingly and without coersion [sic] designating the Peace Officers Association to act as their sole exclusive collective bargaining representative in all matters pertaining to all terms and conditions of employment.
>
> I, Dennis Gilbert, do swear that the signatures on the Authorization Petition were signed in my presence on the date written on the Petition by the persons whose names appear on those petitions.

affidavit seeking to amend the petition to include the relevant information omitted from the petition, i.e., that the Association is the petitioner and that Gilbert is president of the Association.

At the conference held on January 7, 2002, the ALJ advised CSEA that annexed to the representation petition was a showing of interest in support of CSEA's decertification and the Association's certification.

On January 16, 2002, CSEA moved to dismiss the representation petition on the basis of its filing by an individual and that the Association was not an employee organization or, in the alternative, to schedule a hearing on the issue of whether the Association existed at the time the petition was filed. By letter dated January 18, 2002, the ALJ dismissed the motion on the grounds that the petition and supporting affidavits were sufficient to establish the existence of the Association at the time the petition had been filed. The ALJ scheduled a conference on January 31, 2002 for the purpose of scheduling the details of an election.

On February 4, 2002, CSEA commenced the instant interlocutory appeal from the ALJ's ruling.

## DISCUSSION

As we have previously held, permission to appeal rulings made in conjunction with the processing of a representation petition will not be granted absent extraordinary circumstances.[2] We are persuaded to grant review of the issues raised in CSEA's

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[2]*State of New York (NYSCOPBA)*, 31 PERB ¶3058 (1998); *County of Putnam*, 31 PERB ¶3031 (1998); *Town of Saugerties*, 30 PERB ¶3002 (1997); *Town of Putnam Valley and Town of New Paltz*, 28 PERB ¶3049 (1995).

exceptions because of the serious policy implications raised by CSEA's argument that noncompliance with the filing requirements may not be subsequently cured by post-petition conduct. "The exceptions question the very propriety of conducting an election because the preconditions to that election allegedly have not been met."[3]

Section 201.2(a) of our Rules of Procedure (Rules) expressly states that:

> A petition for investigation of a question concerning representation of public employees under the act (hereinafter called a petition for certification), or a petition alleging that an employee organization which has been certified or is being currently recognized should be deprived of representation status as to all or part of a unit (hereinafter called a petition for decertification), may be filed by one or more public employees or any employee organization acting in their behalf, or by a public employer, provided that individual employees may not file a petition for certification.

We have strictly enforced our Rules in representation cases because they are intended to bring stability and certainty to a process which profoundly affects the employment rights and interests of many.[4] Strict enforcement of our Rules also avoids needless dissipation of our resources and wasting public funds to conduct representation proceedings only to later dismiss the petition because the petitioner neglected to comply with the Rules.[5]

The ALJ allowed the Association to amend the petition by submitting a post-petition affidavit identifying the Association as the petitioner and Gilbert as the

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[3]*State of New York (NYSCOPBA)*, *supra* note 2, at 3121.

[4]*See Franklin Square Union Free Sch. Dist., et. al*, 28 PERB ¶3036 (1995); *Enlarged City Sch. Dist. of the City of Amsterdam*, 21 PERB ¶3042 (1988); *New York Convention Ctr. Operating Corp.*, 20 PERB ¶3063 (1987); *County of Rensselaer*, 11 PERB ¶3046 (1978).

[5]*See Jacob K. Javits Convention Ctr.*, 19 PERB ¶3056(1986).

Association's president. This was error. Our Rules in representation matters do not provide for the amendment of petitions. "As written, the Rules are absolute; they must be so applied."[6] If we were to allow post-petition submissions to cure defects in the petition at the time of filing up to the date of certification, then all of the other conditions attached to the invocation of our representation jurisdiction become meaningless.[7] The petition for certification, filed by an individual, could not be processed and should have been dismissed.

Our inquiry is not ended here, however. While the petition cannot be processed as a petition for certification, the petition and the showing of interest also seek the decertification of CSEA. Even if we were to consider that part of the petition separately, it would still be dismissed. The declaration of authenticity submitted by Gilbert in support of the showing of interest is fatally defective. Section 201.4(d)(1) of the Rules requires that the declaration of authenticity include the name of the declarant, and a statement of the declarant's authority to execute it and, if on behalf of an employee organization, the declarant's authority to execute it on behalf of the organization. Finally, §201.4(d)(2) of the Rules requires the declarant to state that inquiry was made that the signatories of the showing of interest are included in the existing

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[6]*County of Rensselaer*, *supra* note 4, at 3078. Contrast the absence of language permitting amendments in the Rules regarding representation petitions with Rules, §204.3(e), which provides that an ALJ may permit the respondent to amend the answer to an improper practice charge at any time before or during the hearing, or at any time prior to the issuance of the ALJ's decision and recommended order.

[7]*See Franklin Square Union Free Sch. Dist.*, *supra* note 4.

negotiating unit. Neither Gilbert's declaration nor Mullen's subsequent affidavit complies with these Rule requirements. Therefore, the petition must be dismissed in its entirety.[8]

For the reasons set forth above, CSEA's exceptions are granted and the ALJ's ruling denying CSEA's motion to dismiss the Association's petition is reversed.

IT IS, THEREFORE, ORDERED that the petition be, and it hereby is, dismissed.

DATED: March 26, 2002
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[8]*See Jamesville-DeWitt Central Sch. Dist.*, 31 PERB ¶3049 (1998).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**CITY OF BUFFALO,**

Charging Party,

- and - **CASE NO. U-22204**

**BUFFALO POLICE BENEVOLENT ASSOCIATION,**

Respondent.

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**MICHAEL RISMAN, CORPORATION COUNSEL (MATTHEW VAN VESSEM of counsel), for Charging Party**

**SCHWAN, SAMMARCO & SAMMARCO (W. JAMES SCHWAN of counsel), for Respondent**

## BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Buffalo Police Benevolent Association (PBA) to a decision of an Administrative Law Judge (ALJ) which found that the PBA had violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when, after August 28, 2000, it failed and refused to negotiate collectively in good faith with the City of Buffalo (City) for a timeline to implement one-officer/two-officer patrols.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

## EXCEPTIONS

The PBA alleged twenty-three exceptions to the ALJ decision. In substance, the PBA alleged that the ALJ's findings of fact were incorrect which, in turn, led to his erroneous conclusion of law.

## FACTS

The facts have been set forth in detail in the ALJ's decision.[1] We will confine ourselves to those facts relevant to this appeal.

On December 4, 2000, the City filed an improper practice charge alleging that the PBA violated §209-a.2(b) of the Act by refusing to negotiate over proposals and a draft agreement relating to the implementation of a timetable to commence the utilization of one-officer/two-officer patrols.

The PBA denied the charge and asserted in its defense that the charge failed to state a claim upon which relief can be granted, it was untimely, it raised a violation of the parties' collective bargaining agreement, thereby divesting this Board of jurisdiction and the City had waived any right to negotiate over the subject matter because the issue was settled by a 1992 interest arbitration award.

Hearings were held on various days in 2001 and the record was closed on December 3, 2001. During the hearings, the ALJ received into the record as Respondent's Exhibit 1 the 1992 interest arbitration award. In that award, the public arbitration panel endorsed the concept of one-officer/two officer patrols and made the following award:

> A committee [sic] of equal City of Buffalo/Police Benevolent Association membership is to be formed to study and discuss such matters as safety, bargaining unit impact, and other items regarding a shift to one-person/two-person patrol vehicles. The total number of members is to be mutually determined by the City and the PBA.

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[1]*Buffalo Police Benevolent Ass'n*, 35 PERB ¶4508 (2002).

> The Committee shall make effective recommendations to the Commissioner of Police.
>
> The City and the PBA shall negotiate a timetable for the implementation of one-person/two-person patrols.

The ALJ also received into the record, as Joint Exhibit 2, the contract settlement between the parties that covered the period July 1, 1992 through June 30, 1995. Paragraph 24 of the settlement entitled "One/Two Officer Patrols" contained a reference to the 1992 interest arbitration award (also referred to as the Prosper Interest Arbitration Award) which provides: "[b]y side letter re-state the parties' Agreement to comply with the Prosper Interest Arbitration Award concerning one/two officer patrols with the following provision: Each party to this Agreement pledges its best effort towards moving to a one/two officer patrol system."

## DISCUSSION

The PBA contends that the charge failed to state a claim upon which relief may be granted. To address that issue, we must look to §209-a.2(b) of the Act which makes it an "improper practice for an employee organization or its agents deliberately to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer."

The Board has held that reasonable expedition is expected in bargaining and that "reasonableness is . . . judged by the totality of the circumstances under the facts

of each case."[2] A party's imposition of conditions for setting a negotiating schedule, unavailability and unexplained cancellations of sessions may violate the Act.[3]

In reaching his decision, the ALJ went through a litany of correspondence found in charging party's Exhibits 1 and 2 that reflected the PBA's general unavailability to meet with the City representatives and negotiate. This dilatory conduct started in June 1992 when the PBA failed to respond to the City's request to establish the Committee referred to in the 1992 interest arbitration award.

The ALJ found that the City had been less than expeditious in meeting its obligation to negotiate and "[d]uring the decade that the issue of one-officer patrols has been joined, both parties at times appeared to be more interested in protracting the discussion rather than resolving the issue and reaching a mutual accommodation."[4] This, however, provides no excuse for the PBA to refuse to bargain once the City expressed its earnest desire to conclude negotiations over this issue in correspondence through August 2000.[5]

In 1992, the then and current PBA President, Robert P. Meegan, Jr., sat as the employee member of the interest arbitration panel and expressed his support for the concept of one-officer patrols. This concept was proposed in 1992 as a method to

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[2]*City of Dunkirk*, 25 PERB ¶3029, at 3061 (1992); Jerome Lefkowitz, et al., *Public Sector Labor and Employment Law* 321 (2nd ed. 1998).

[3]*See Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO, Town of Riverhead Unit of Local 852*, 25 PERB ¶3057 (1992).

[4]*Supra*, note 1, at 4525.

[5]*Id.* at 3122.

mitigate the deteriorating fiscal condition of the City. Based upon this record, we find that the PBA has failed to translate its support for the concept into action.

The ALJ correctly dismissed the timeliness defense. The City's charge was filed within four months of the City's letter of August 28, 2000, requesting negotiations. The PBA never responded to the City's request. This, after the PBA counsel wrote to the City on August 16, 2000, stating that a meeting of the parties was still necessary. We agree that this conduct acknowledged the PBA's continuing obligation to bargain and the record evidences its subsequent failure to do so.

The PBA also alleges that the City has waived its right to negotiate the subject matter of the charge by virtue of the language of the arbitration award, subsequent agreement and its conduct. We do not agree. Section 205.5(d) of the Act reserves to PERB jurisdiction over an alleged violation of an agreement that would "otherwise constitute an improper employer or employee organization practice . . . ."

> We have held that in certain matters where there is contractual language related to the subject-matter of the charge, if there exists an independent statutory right with respect to the subject-matter, we retain jurisdiction even if the respondent's action is also arguably in violation of the contract language.[6]

In *County of Nassau,*[7] we clarified the difference between jurisdiction and waiver, or duty satisfaction, as we defined it.

> [U]nless the agreement is a reasonably arguable source of right to the charging party with respect to the same subject matter as the improper practice charge, no contract violation may be established, and our jurisdiction is clear. That an agreement may "cover" the issue raised in an improper practice charge is not enough to divest

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[6]*Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶3019, at 3044 (2001). *See also City of Buffalo (Fire Dep't)*, 17 PERB ¶3090 (1984).

[7]23 PERB ¶3051, at 3108 (1990).

> PERB of jurisdiction over that charge pursuant to §205.5(d) of the Act. Of course, if the agreement is a source of right to the employer, an issue of waiver of the right to negotiate may be presented. However, waiver of the right to negotiate is a matter which necessarily lies within PERB's jurisdiction. A determination whether a party has waived the right to negotiate an issue goes to the disposition of the charge on its merits, but not to PERB's power to reach those merits.

While the language of the arbitration award, as incorporated by reference into the parties' 1992-1995 collective bargaining agreement, gives certain rights to the City with respect to the negotiation of a timetable for the implementation of the one-officer/two-officer patrols, such language does not divest us of jurisdiction over an alleged violation of §209-a.2(b) of the Act.

The ALJ recognized that neither the City nor the PBA has fulfilled the commitments made in these documents. The parties' failure to approach this on-going issue with a serious intent to resolve the issue and implement their agreements with respect to one-officer/two-officer patrols is evidenced by the fact that they have had this issue before them for over ten years without finalizing their initial agreement to negotiate. We do not find, given the totality of the parties' conduct, that the City has waived its right to negotiate the timetable for the implementation of the patrols. The language of the arbitration award and the subsequent agreement, coupled with the parties' conduct, supports our conclusion that the City has retained its statutory right to negotiate the subject matter of the charge.[8]

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[8]*See Village of Endicott* , 23 PERB ¶3053 (1990). *See also Hunter-Tannersville Teachers' Ass'n*, 16 PERB ¶3109 (1983); *Incorporated Village of Lake Success*, 17 PERB ¶3103 (1984).

We find, therefore, that we have jurisdiction over the City's allegation that the PBA has refused to negotiate in good faith.

Based on the foregoing, we deny the PBA's exceptions and affirm the decision of the ALJ.

We find, accordingly, that the PBA violated §209-a.2(b) of the Act by failing and refusing to negotiate in good faith with the City regarding proposals and a draft agreement for the implementation of a timetable to commence the utilization of one-officer/two-officer patrols.

IT IS, THEREFORE, ORDERED that the PBA:

1. Cease and desist from refusing to negotiate in good faith with the City for a timeline for the implementation of one-officer/two-officer patrols.
2. Post a notice in the form attached at all locations ordinarily used to post written communications to unit employees.

DATED: March 26, 2002
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO
THE DECISION AND ORDER OF THE

## NEW YORK STATE
## PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

## NEW YORK STATE
## PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Buffalo in the unit represented by Buffalo Police Benevolent Association (PBA) that the PBA will forthwith:

1. Negotiate for a timeline to implement one-officer/two-officer patrols and immediately bargain in good faith regarding such implementation.

**Dated** . . . . . **By** . . . . . .
(Representative) (Title)

**Buffalo Police Benevolent Association**

. . . . . .

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 317, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-22263**

**TOWN OF SCRIBA,**

Respondent.

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**CHAMBERLAIN, D'AMANDA, OPPENHEIMER & GREENFIELD (MAIREAD E. CONNOR of counsel), for Charging Party**

**FERRARA, FIORENZA, LARRISON, BARTLETT & REITZ, P.C. (CRAIG M. ATLAS of counsel), for Respondent**

## BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Scriba (Town) to a decision of an Administrative Law Judge (ALJ) finding that the Town violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when, as alleged by Teamsters Local 317, International Brotherhood of Teamsters, AFL-CIO (Teamsters) in its improper practice charge, the Town engaged in bad faith bargaining regarding wages during negotiations for a collective bargaining agreement.

The ALJ found that the Town refused to negotiate wages with the Teamsters during negotiations for the first collective bargaining agreement with the Teamsters after the Town recognized the Teamsters as the exclusive bargaining agent for a unit of

certain employees of the Town's Highway Department. Finding that the Town relied upon a five-year salary plan with the Highway Department employees, entered into prior to the Teamsters' recognition, an action found by the ALJ to have been "taken arguably for the purpose of preventing the organization of public employees in derogation of the purposes of the Act",[1] the ALJ determined that the Town had violated §§209-a.1(a) and (d) of the Act by continuing to insist that the salary plan precluded further negotiations on wages.

## EXCEPTIONS

The Town argues that the ALJ erred by taking evidence about the five-year salary plan, which it asserts is outside the scope of the instant improper practice charge; by finding that it refused to negotiate in good faith; and by failing to consider the totality of the Town's conduct in negotiations. The Teamsters supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the ALJ.

## FACTS

In August 1999, the Town met with a group of then unrepresented Highway Department employees to discuss a salary increase for the coming year. Historically, the Town and the Highway employees met in August of each year to discuss the terms and conditions of employment for the next year. The employees proposed a salary increase of $.40 per hour for 2000 and the Town responded with an offer for a salary

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[1]35 PERB ¶4501, at 4504 (2002).

increase for each of five years but paid up front in the first year, to equal an increase of $2.00 per hour in the first year. The Town's stated rationale was that it had determined that overtime had to be reduced or possibly eliminated and the up-front salary increase would make up for the average loss of overtime pay. The Town agreed to reopen salary negotiations in three years if any other two towns in the county paid similar employees at a higher rate.[2] The Town and the employees agreed to the Town's proposal in September 1999.

The Teamsters' representative, Mark May, began meeting with the Highway Department employees in early September 1999, discussing representation with them and obtaining signed membership cards. The Teamsters thereafter made a request for recognition to the Town Supervisor, Steve Baxter, on October 1, 1999. The Town did not respond. The Town Board adopted a resolution approving the wage increase on October 20, 1999. The Town then mailed a notice to the Highway Department employees informing them of the terms of the Board resolution.[3] The Teamsters filed a petition for certification with PERB on October 31, 1999.

On December 2, 1999, the Teamsters filed an improper practice charge (Case No. U-21314) with PERB, alleging that the Town had improperly entered into a wage agreement with the Highway Department employees during the pendency of a representation proceeding. Both the representation petition and the improper practice

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[2]The $2.00 per hour pay increase made the Town Highway Department employees the highest paid employees in the county in those job titles.

[3]Apparently, in prior years, the notice of the wage increase was mailed to the Highway Supervisor and he distributed the notice to the employees.

charge were subsequently withdrawn, with prejudice, by the Teamsters, in January 2000, pursuant to a settlement agreement with the Town that provided, *inter alia*, that the Town would recognize the Teamsters as the exclusive bargaining agent for the Highway Department employees.

The parties commenced negotiations for a collective bargaining agreement in May 2000. They met eight times, then the Teamsters declared impasse on November 16, 2000. Thereafter, the parties met four times with a mediator assigned by PERB prior to the hearing on the instant charge. The Town arranged for a court reporter to make transcripts of the last three bargaining sessions before impasse was declared and of all four mediation sessions.

At the hearing in this case, the parties entered into a stipulation on some of the facts and admitted into evidence portions of the negotiation and mediation transcripts. The Teamsters called two witnesses, May, and Tom MacDougall, who is an MEO, the Deputy Highway Superintendent and the Teamsters' steward. At the close of the Teamsters' direct case, the Town made a motion to dismiss. The ALJ reserved decision on the motion and the Town rested without calling any witnesses.

During the negotiations for the collective bargaining agreement, the parties reached agreement on some issues but were unable to reach agreement on others. The issue upon which there has been no agreement, and which is the subject of the instant charge, is wages. The Teamsters proposed a salary increase of 7% for each year of the contract, for a term of three years. The Town's initial position, as articulated by Baxter, its chief negotiator, was for no salary increase. The rationale given by Baxter during the first negotiation sessions was that the Town had already given a wage

increase, referring to the agreement reached with the employees before the Teamsters was recognized as their bargaining agent. At the first mediation session held on December 11, 2000, Baxter altered the Town's position by stating that he needed justification to show the Town Board for any further action as to wages.[4]

At the January 25, 2001 mediation session, the mediator asked Baxter what the Town's financial offer was with respect to wages and Baxter responded that there was no offer and added:

> The answer is no. What we really need to – See, the Town does, and we don't want to slam the door, you know, any harder than we have to. We want to see inequity here, that we're not treating our employees properly. We want to see where there's wages that are outlined. We want to see where we, you know, haven't done, you know, our job and responsible job of compensating our employees properly.
>
> ...We want to see where we're not, you know offering the right amount of money to the employees.[5]

May then told Baxter that "[w]e understand that you front loaded the five years and part of it was good faith with the employees. We understand that, all right. But we have to get increases, okay, during the term – during the term of our contract."[6] In response, Baxter suggested that May talk to the Town Board to explain the Teamsters' position with respect to salary.[7] Again, at the mediation session on April 25, 2001, Baxter stated that the Town Board's review of the towns around the Town of Scriba and

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[4]Transcript of Labor Agreement Discussions, December 11, 2000, pp. 46-7.

[5]Transcript of Labor Agreement Discussions, January 25, 2001, pp. 80-1.

[6]*Id.* at p. 91.

[7]May never attended a Town Board meeting for that purpose.

several adjoining counties showed that the Highway Department employees were "on the top of the heap right now in regard to wages, hours, benefits, working conditions, equipment."[8] He then asked May for some justification for the Teamsters' proposed wage increase to take back to the Town Board so they would review their position with respect to wages. May's response was "Well, somebody has to be number one."[9] Later, May indicated that the Town's ability to pay was also justification for a wage increase. Baxter responded that the Town was facing a diminished ability to pay in the coming years, referring to a tax settlement agreement with a nuclear plant located within the Town. Baxter then expressed a willingness to make a recommendation to the Town Board to accept a counter-proposal on wages from the Teamsters if May provided proper justification for the increase.

On June 11, 2001, at the last mediation session, May proposed a salary increase of $750 as a signing bonus and $.50 per hour for each year of the contract for the remainder of the term of the collective bargaining agreement. May testified that his proposal that the Town switch to the Teamsters' health insurance plan would save the Town enough money to fund the proposed wage increase. The Town expressed a willingness to utilize the Teamsters' health insurance plan but the parties reached no agreement in mediation on the amount of the Town's contribution. The parties thereafter proceeded to fact-finding.[10]

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[8]Transcript of Labor Agreement Discussions, April 25, 2001, p. 4.

[9]*Id.*

[10]At the time of the hearing, the parties had met with the fact finder on August 29, 2001. There is no evidence in the record about the current status of negotiations.

DISCUSSION

Both parties urged the ALJ to look at the totality of the conduct of the Town in deciding the improper practice charge.[11] Unfortunately, the ALJ focused on the subject matter of the prior improper practice charge, and the initial negotiations sessions between the parties, in reaching his conclusions that the Town entered into the five-year wage agreement with the then unrepresented Highway Department employees for the purpose of influencing them to reject representation by the Teamsters, and then improperly insisted that the agreement precluded the Town from negotiating any subsequent wage increases with the Teamsters.

The Teamsters' prior improper practice charge alleged that the Town had violated §§209-a.1(a) and (c) of the Act by threatening not to sign a contract with the Teamsters if they became certified as the bargaining agent and by telling employees that they would not change the terms of the five-year wage agreement with the employees if they became represented by the Teamsters. The Teamsters withdrew the improper practice charge "with prejudice" in settlement of the charge and based upon the Town's agreement to recognize the Teamsters as the bargaining agent for the Highway Department employees.

We find that the withdrawal "with prejudice" of an improper practice charge precludes the introduction of the allegations which were the subject of the prior charge in any proceeding on a subsequent improper practice charge which alleges the same facts as set forth in the settled charge, even if the subsequent charge sets forth a

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[11] *See Board of Educ. of the City Sch. Dist. of the City of New York*, 32 PERB ¶3051 (1999). *See also Civil Service Employees Ass'n, Inc.*, 14 PERB ¶3092 (1981).

separate, different claim. The withdrawal of a claim "with prejudice" is res judicata so as to bar a new claim.[12] Therefore, the ALJ was precluded from determining that the actions of the Town which were the subject of the prior improper practice charge were improperly motivated because of the terms of the parties' settlement agreement and he was further precluded from using that finding as the basis for his finding of improper motivation in the instant charge.

Because the ALJ could not properly rely upon the Town's actions as alleged in the prior improper practice charge to establish a "course of conduct" by the Town, which would support his finding that the Town was improperly motivated when it, as alleged herein, failed to negotiate an agreement as to wages, he could not, based on the lack of evidence of animus introduced in support of the instant charge, conclude that the Town violated §209-a.1(a) of the Act.[13]

Were it not for the withdrawal with prejudice of the prior improper practice charge, the ALJ could have considered the prior actions of the Town with respect to the unit employees, especially since the activities occurred at a time proximate to the Teamsters' organizing campaign. "Actions which are taken more than four months prior

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[12]David D. Siegel, *New York Practice* §298 (3d edition 1999). *See also Sheriff and County of Oneida*, 23 PERB ¶4527 (1990).

[13]To establish the improper motivation necessary for a finding that §209-a.1(a) of the Act have been violated, the charging party has the burden of proving engagement in protected activities, that the employer had knowledge of the activities and that it acted because of those activities. If a prima facie violation has been established by direct evidence or by circumstantial evidence, the burden shifts to the respondent to rebut that violation by proof that legitimate business reasons prompted the action. *Convention Center Operating Corp.*, 29 PERB ¶3022 (1996).

to the filing of an improper practice charge can be relevant in establishing the elements of a timely improper practice charge even though those acts might be barred, as untimely, from consideration as independent violations of the Act."[14] He could have properly considered the Town's earlier action to determine if there were a "course of conduct" by the Town that would have evidenced its improper motivation in the action which is the subject of the instant charge.[15] Because the allegations which were the subject of the prior charge were not properly before him, and there is no record evidence that the Town's negotiation posture was improperly motivated, the ALJ erred in determining that the Town was engaged in a course of conduct designed to thwart the organizing efforts of the Teamsters.

We now turn to the alleged §209-a.1(d) violation. An employer's obligation to maintain the status quo starts on the date it is presented with a bona fide representation question and continues to the date a wage and benefit package is fixed by collective negotiations with the recognized or certified bargaining agent.[16] The Town acknowledged this obligation in negotiations. The Town's negotiator, Baxter, at the initial negotiations sessions, did indicate, however, that the Town believed that it had a wage agreement which covered the unit employees for five years and that it would not pay any wage increases because it had already paid the unit employees all the wage

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[14]*Greenburgh No.11 Union Free Sch. Dist.*, 32 PERB ¶3035, at 3080 (1999).

[15]*See Greenburgh No.11 Union Free Sch. Dist.*, 30 PERB ¶3052 (1997).

[16]*Onondaga-Cortland-Madison BOCES*, 25 PERB ¶3044, at 3092 (1992).

increases it was prepared to pay, for at least three years.[17] Given our decision, *infra*, we do not need to decide whether, if the Town had continued to maintain that position throughout negotiations, such an insistence would be violative of §209-a.1(d) of the Act.[18]

At least by the time the parties had reached mediation, the Town had moved from that position and was indicating a willingness to negotiate some adjustment to wages. Baxter requested that the Teamsters provide him with some justification for, what was at that time, a 7% salary increase for each of at least three years. Baxter explained that it was the Town Board's position that the unit employees were the highest paid employees, with the best benefits, of employees in similar positions in all the towns located within Oswego County and adjacent counties and that he needed some justification to go to the Town Board and recommend a salary increase. May later modified the Teamsters' wage proposal but offered no explanation except for a glib "Well, somebody has to be number one" and, later, a reference to the Town's ability to pay. A party to collective negotiations has a right to seek an explanation of the proposals of the other party to the negotiations and that party has an obligation to explain the rationale of its negotiating position upon request.[19] The Town's requests for

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[17]The Town was referring to the "reopener" portion of the five-year wage plan.

[18]*See J. I. Case Co. v. NLRB*, 321 US 332 (1944).

[19]*See Deposit Cent. Sch. Dist.*, 26 PERB ¶4659 (1993), *aff'd*, 27 PERB ¶3020 (1994). (subsequent history omitted)

a rationale were met with no real explanation, although at the final mediation session between the parties, the Teamsters further modified its salary proposal and offered the Town a plan for possibly funding a wage increase.

This record certainly evidences that the Town and the Teamsters were far apart on the subject of wages. The Town maintained its position that it would not agree to a salary increase, but moved from its stated rationale to a request for more information and a justification from the Teamsters, and eventually indicated a willingness to consider the Teamsters' arguments in favor of a wage increase. The Town's initial position that it would not offer nor agree to a salary increase does not automatically equate to bad faith bargaining.[20] Adamancy or hard bargaining is not, by itself, evidence of a failure to negotiate in good faith.[21]

By the totality of its conduct, we find that the Town evidenced its intention to negotiate in good faith. The Town maintained the status quo during negotiations, it reached agreement on some proposals, indicated a willingness to agree to the Teamsters' proposal regarding health insurance if the rate of contribution could be agreed upon by the parties and, finally, moved from its position of no wage increase to a position where it would entertain the Teamsters' wage proposal if it was satisfied with the rationale offered by the Teamsters. The Town also agreed to a salary reopener if

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[20]*See Columbia County Chapter of the Civil Service Employees Ass'n, Inc. and the Civil Service Employees Ass'n, Inc.*, 10 PERB ¶3047 (1977).

[21]*Id. See also Deposit Cent. Sch. Dist.*, *supra* note 19.

the conditions it requested could be met.[22] We find, therefore, that the ALJ also erred when he found that the Town had violated §209-a.1(d) of the Act.

Based on the foregoing, we find that the Town was not engaged in bad faith negotiations when it failed to agree to a wage increase for unit employees during collective negotiations with the Teamsters. We find that there is insufficient evidence in the record to support a finding that the Town violated §§209-a.1(a) and (d) of the Act. Therefore, the Town's exceptions are granted and the decision of the ALJ is reversed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed in its entirety.[23]

DATED: March 26, 2002
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

[22]We do not find, as did the ALJ, that the agreement to a wage reopener was pretextual because the unit employees were already the highest paid employees in the county in the same or similar titles. Should circumstances in other towns change the agreed upon condition for the reopener, the Town would be obligated to negotiate a wage increase. Just because the condition for the reopener is unlikely to occur does not render the Town's agreement to it pretextual or evidence of bad faith negotiations.

[23]Member Abbott recused himself from consideration of this case.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**AUDREY GORE,**

Charging Party,

- and -

**CASE NO. U-22678**

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,**

Respondent,

- and -

**HEALTH RESEARCH, INC.**

Employer.

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**AUDREY GORE, *pro se***

**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Respondent**

**WHITEMAN OSTERMAN & HANNA, LLP (HEATHER D. DIDDEL of counsel), for Employer**

## BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Audrey Gore to a decision of an Administrative Law Judge (ALJ) dismissing Gore's improper practice charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO

(CSEA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by failing to respond to inquiries she made to CSEA staff. CSEA raised a jurisdictional defense that, in addition to PERB lacking jurisdiction over the charge, Health Research, Inc. (HRI) is a private sector employer and Gore was not, therefore, a public employee while in the employ of HRI. The ALJ granted HRI permission to intervene in order to litigate the jurisdiction defense.

The ALJ determined that Gore had not set forth sufficient facts to prove that HRI is a public employer within the meaning of the Act. Gore contends in her exceptions that the ALJ was incorrect. In support of her exceptions, she annexed a copy of the Certificate of Incorporation of HRI, a membership corporation.

In opposition to Gore's exceptions, HRI has raised an objection that it was not served as required by §213.2(a) of our Rules of Procedure (Rules). Having reviewed the record and considered the parties' arguments, we dismiss and deny the exceptions on procedural grounds.

Section 213.2(a) of our Rules requires a party filing exceptions to serve those exceptions on all other parties and to file proof of such service with us. Gore has not done either. As service is a component of timely filing, we will dismiss exceptions upon objection by a party who has not been served.[1] Gore's exceptions, not having been served on CSEA and HRI, must be dismissed.

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[1]*County of Washington*, 32 PERB ¶3033 (1999); *see also Yonkers City School District*, 30 PERB ¶3026 (1997).

Based upon the foregoing, we need not reach the merits of Gore's exceptions. Therefore, the exceptions are dismissed and denied and the ALJ's decision dismissing the improper practice charge is affirmed. SO ORDERED.

DATED: March 26, 2002
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 264,**

Petitioner,

-and- **CASE NO. C-5155**

**NIAGARA FRONTIER TRANSPORTATION AUTHORITY,**

Employer.

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## CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters Local 264 has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time transportation supervisors

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters Local 264. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 26, 2002
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member